

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of)
)
Inquiry Concerning the Deployment of Advanced)
Telecommunications Capability to All Americans)
in a Reasonable and Timely Fashion, and Possible) CC Docket No. 98-146
Steps to Accelerate Such Deployment Pursuant)
to Section 706 of the Telecommunications Act)
of 1996)

REPLY COMMENTS OF
KMC TELECOM, INC.

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SUMMARY

In this proceeding, the Commission has a significant opportunity to identify regulatory measures that can “encourage the deployment on a reasonable and timely basis of advanced communications capability to all Americans” as envisioned in Section 706(b) of the Telecommunications Act of 1996 (1996 Act). KMC has already made a number of specific suggestions in comments in response to the *Section 706 Rulemaking*. In these reply comments, KMC submits a number of suggestions concerning inside wiring practices of incumbent local exchange carriers (LECs) and building owners. KMC urges the Commission to initiate a rulemaking to update its inside wiring rules in light of the overarching pro-competitive goals of the Telecommunications Act of 1996. The Commission should propose rules that will assure that incumbent LECs and building owners cannot use their control of the “last one hundred feet” of the local loop to unreasonably restrict the ability of consumers and businesses to choose their local service provider. The Commission should additionally, based on the record in this proceeding, declare that arrangements between building owners and incumbent LECs that provide for exclusive access by the incumbent to inside wiring are unlawful.

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**REPLY COMMENTS OF
KMC TELECOM, INC.**

KMC Telecom, Inc. ("KMC"), respectfully submits these Reply Comments in the above-captioned proceeding concerning deployment of advanced telecommunications capability to all Americans.¹

KMC Telecom, Inc. is authorized to provide, through its subsidiaries, competitive local and long distance services in 17 states, and Puerto Rico, and is operational in six states (Alabama, Florida, Georgia, Louisiana, Texas, and Wisconsin). KMC has installed state-of-the-art networks in Huntsville, Alabama; Melbourne, Florida; Savannah and Augusta, Georgia; Baton Rouge and Shreveport, Louisiana; Corpus Christi, Texas; and Madison,

¹ *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, Notice of Inquiry, CC Docket No. 98-146, FCC 98-187, released August 7, 1998, ("NOI").

Wisconsin, and will soon build similar networks in several other cities in the Southeast and Midwest.

I INTRODUCTION

KMC supports the Commission's inquiry to examine whether advanced telecommunications capabilities are being provided to all Americans on a reasonable and timely basis. KMC believes that the best way to encourage the provision of advanced services by incumbent and competitive local exchange carriers (LECs) is to fully enforce and implement the interconnection, unbundling, and resale obligations of Section 251 of the Act.² This would promote the fundamental market opening provisions of the Telecommunications Act of 1996 ("1996 Act")³ by providing CLECs with the ability to interconnect with incumbent LEC networks and obtain unbundled network elements on reasonable terms and conditions. KMC has submitted comments in connection with the *Section 706 Rulemaking* concerning measures that the Commission could take to promote provision of competitive and advanced telecommunications services to all Americans.⁴ KMC additionally submits in this proceeding these Reply Comments concerning access to inside wiring in multi-unit business and residential buildings.

² 47 U.S.C. section 251(c).

³ Pub. L. 104-104, Title VII, Feb. 8, 1996, 110 Stat. 153.

⁴ *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Notice of Proposed Rulemaking, CC Docket No. 98-147, FCC 98-188, released August 7, 1998 ("*Section 706 Rulemaking*").

II

REASONABLE AND TIMELY ACCESS TO INSIDE WIRING IS ESSENTIAL TO NEW ENTRANTS' ABILITY TO PROVIDE COMPETITIVE AND ADVANCED SERVICES

Inside wiring in a multi-unit building is wiring that extends from the service entrance to the building to individual customers premises. Such wiring usually consists of service entrance facilities, cross-connect facilities, house riser cable, and horizontal distribution wiring on each floor. Under the Commission's inside wiring rules the demarcation point between telephone company and customer-owned wiring can, depending on a number of factors, either be at the minimum point of entry to the property or at some intermediate point between the minimum point of entry and each unit within the building.⁵ Therefore, inside wiring in any particular building may be owned by either the telephone company (usually the incumbent LEC) or the building owner, or a combination of both.

Regardless of ownership, however, when business or residential customers choose KMC as their local service provider, KMC requires access to the inside wiring in order to meet the customer's request for service. Thus, KMC or other new entrants cannot provide service unless they are able to connect their facilities to the customer's premises by means of wiring inside the building. Usually, such access is required at the service entrance to the building, or a nearby

⁵ See 47 C.F.R. Section 68.231(a) and (b): *Report and Order and Further Notice of Proposed Rulemaking*, CC Docket No. 88-57 (Review of Sections 68.104 and 68.213 of the Commission's Rules Concerning Competition of Simple Inside Wiring to the Telephone Network and Petition for Modification of Section 68-213 of the Commission's Rules filed by the Electronic Industries Association), 5 FCC Rcd 4686 (1990).

utility closet. In addition, as a practical matter, timely access is required in order for KMC or new entrants to be able to offer a competitive service. Therefore, inside wiring effectively constitutes a bottleneck facility as much as other portions of the local loop. Wiring in multi-unit residential and business buildings constitutes the "last hundred feet" of the local loop serving customers.⁶

III INCUMBENT LECS' AND BUILDING OWNERS' INSIDE WIRING PRACTICES ARE THWARTING ACHIEVEMENT OF KEY REGULATORY GOALS

Incumbent local exchange carriers (ILECs) and building owners in many instances are not providing timely access, or any access at all to inside wiring in multi-unit buildings. KMC has encountered situations in which a customer wishes to obtain telephone, data, or Internet services from KMC but KMC is unable to provide them promptly or on a cost-effective basis because the building owner and current provider (the incumbent LEC) have entered into arrangements which effectively provide for exclusive access to building wiring and conduit, or the exclusive right to install it, by the incumbent.

Exclusive contracts or arrangements can clearly frustrate the desire of the customer, and even the building owner, to obtain competitive services. In many cases, these arrangements were established before building owners recognized that they might have a choice of local service provider. These provisions also frustrate the goals of the 1996 Act to achieve competition in the provision of local services and to promote the availability of advanced services. Such provisions

⁶ *NOI* at para. 53.

constitute direct barriers to infrastructure investment because they frustrate the ability of KMC and new carriers to utilize the intrabuilding infrastructure necessary to provide new services.

In other instances, where there are no such exclusive arrangements, KMC has found that building owners either directly or through agents are attempting to market and sell access to inside wiring to competing carriers without regard to the choice of service provider of the telecommunications customers who are tenants in the building. This practice also frustrates the ability of business and residential customers to receive new competing services because their choice of service provider can effectively be vetoed by the building owner. In some cases, the arrangements offered by the building owner would also provide for exclusive access to the inside wiring by the new service provider.

KMC believes that the foregoing practices of incumbent LECs and building owners are seriously hindering achievement of the goals of the Act because incumbent LECs and building owners can control or unduly influence the customer's choice of service provider by simply preventing or restricting the physical access to wiring necessary to serve the customer. These practices reflect the reality that inside wiring is a bottleneck facility that permits the exercise of anticompetitive behavior by building owners or incumbent LECs.

IV THE COMMISSION HAS AUTHORITY TO EXERCISE GREATER REGULATORY OVERSIGHT OVER INSIDE WIRING

Building inside wiring is used in interstate communications. It is well established that the Commission's jurisdiction extends to facilities used for interstate communications

notwithstanding that the facilities in question are intrastate or local.⁷ Therefore, inside wiring falls within the subject matter jurisdiction of the Commission under Title I of the Communications Act.⁸ In addition, as is obvious, the Commission has full jurisdiction under Title II of the Communications Act over incumbent LECs. The Commission additionally has authority under the Act to regulate the terms and conditions under which LECs may enter into contracts for or in connection with communications services.⁹ In addition, under Section 251(c) of the Act, the Commission may require incumbent LECs to interconnect with requesting carriers at any technically feasible point and may require incumbent LECs to offer unbundled access to network elements. Therefore, in situations where inside wiring is owned by incumbent LECs, the Commission may exercise its authority under Sections 201-205 of the Act and/or Section 251(c) to govern the inside wiring practices of incumbent LECs.

⁷ Petition for Emergency Relief and Declaratory Ruling Filed by the BellSouth Corp., 7 FCC Rcd 1619, 1621 (1992) (quoting *New York Tel. V. FCC*, 631 F.2d 1059, 1066 (2d Cir. 1980)); *see also* *Puerto Rico Tel. Co. v. FCC*, 553 F.2d 694, 699 (1st Cir. 1977); *MCI Communications Corp. v. AT&T*, 369 F.Supp 1004, 1028-1029 (E.D. Pa. 1974), *vacated on other grounds*, 496 F.2d 214 (3d Cir. 1974). *See* *NARUC v. FCC*, 746 F.2d 1492, 1499 (D.C. Cir. 1984) ("The dividing line between the regulatory jurisdictions of the FCC and state depends on 'the nature of the communications which pass through the facilities [and not on] the physical location of the lines'" (*citations omitted*)); *Id.* at 1498 ("[e]very court that has considered the matter has emphasized that the nature of the communications is determinative rather than the physical location of the facilities used").

⁸ Section 2(a) of the Communications Act, 47 U.S.C. Section 152(a), gives the Commission jurisdiction over "all interstate and foreign communication by wire..." Wire communication, in turn, is defined as "the transmission of writing, signs, signals, pictures, and sounds of all kinds by aid of wire, cable, or other like connection between the points of origin and reception of such transmission, including all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission." 47 U.S.C. Section (3)(51).

⁹ *See* 47 U.S.C. Sections 201 - 205 and 211.

The Commission may additionally exercise regulatory oversight over inside wiring practices of building owners or their agents. As discussed, inside wiring is used in interstate communications and the Commission has Title I jurisdiction over this wiring.¹⁰ Moreover, the Commission has established that it has exclusive jurisdiction over the terms and conditions under which customers may connect customer premises equipment to the telephone network and inside wiring is a type of customer premises equipment.¹¹ The Commission has already imposed a number of requirements on intra-building wiring that is the property of building owners.¹² Thus, even without asserting extensive direct jurisdiction over building owners the Commission could reach building owners wiring practices by imposing conditions on their ability to connect inside wiring to the regulated nationwide telephone network.

KMC additionally believes that the recent practices of building owners with respect to inside wiring makes them subject to a greater degree of direct regulation under Title II. Building owners should not become subject to Title II jurisdiction merely by virtue of their ownership of inside wiring. However, as discussed, building owners are engaging in practices that touch upon

¹⁰ While such wiring is private property, all telecommunications plant subject to the jurisdiction of the Commission is private property unless it happens to be government owned. Thus, the Commission should not permit building owners to argue that the Commission does not have jurisdiction over inside wiring because it is private property.

¹¹ See *Louisiana Public Service Comm'n v. FCC*, 476 U.S. 355, n. 4 (1986). See also *Maryland Public Service Comm'n v. FCC*, 909 F.2d 1510 (D.C. Cir. 1990); *California v. FCC*, 905 F.2d 1217 (9th cir. 1217); *Texas Public Utility Comm'n v. FCC*, 886 F.2d 1325, 1331 (D.C. Cir. 1989); *National Association of Regulatory Commissioners v. FCC*, 880 F.2d 422, 429 (D.C. Cir. 1989); *North Carolina Utilities Comm'n v. FCC*, 537 F.2d 787 (4th Cir.), *cert. denied*, 429 U.S. 1027 (1976); *North Carolina Utilities Comm'n v. FCC*, 552 F.2d 1036 (4th Cir.), *cert. denied*, 434 U.S. 874 (1977).

¹² See 47 C.F.R. Sections 68.213 and 68.215.

key statutory objectives, *i.e.* their practices are thwarting competition. Thus, there may be important public interest objectives that could be achieved by regulation. Moreover, building owners' are beginning to take on some of attributes of carriers in seeking to participate in the telecommunications marketplace. Thus, to the extent they are offering "access" to customers within a building by selling access to inside wiring, they are offering access services that are not significantly different than LECs offering access to their own bottleneck control of the rest of the loop.¹³ Similarly, exclusive access arrangements with incumbent LECs could readily be interpreted as an interconnection agreement between carriers.¹⁴ Thus, while full Title II regulation would not seem warranted, KMC believes that some degree of Title II jurisdiction over some inside wiring practices of some building owners could be supportable. To the extent necessary, pursuant to Section 10 of the Act, the Commission could forbear from application of Title II requirements other than those minimally necessary to establishing an appropriate degree of regulatory oversight of inside wiring practices of building owners.

¹³ The test for determining common carrier status was enunciated in *NARUC I*, 525 F.2d 630 (D.C. Cir. 1976), *cert. denied*, 425 U.S. 992 (1976) and expanded upon in *NARUC II*, 533 F.2d 601 (D.C. Cir. 1976). These cases established two prerequisites for common carrier status: (1) a "quasi-public character" which arises when there is an undertaking to carry for all people indifferently, whether there is a legal compulsion to do so or this undertaking is done on a voluntary basis, and (2) provision of a service over which customers transmit intelligence of their own design and choosing. KMC submits that building owners' offering of access to customers in multi-unit buildings constitutes such an undertaking and service.

¹⁴ The Commission should consider whether building owners that acquire inside wiring from incumbent LECs become "successor or assigns" under the definition of incumbent LEC set forth in Section 251(e) of the Act.

V PROPOSED REGULATORY SOLUTIONS

The Commission's inside wiring regulatory program has been successful in affording consumers and businesses the opportunity to provide their own inside wiring and connect it to the nationwide public telephone network.¹⁵ Consumers and businesses enjoy a greater range of service and facilities options by being able to choose inside wiring services and products from sources other than the incumbent LEC. At the same time, the Commission's rules under Part 68¹⁶ protect the network from harm that could be caused by customer provision of inside wiring.

However, the Commission has not reviewed and updated its policies and rules concerning inside wiring in light of the overarching goal of the 1996 Act to create "a pro-competitive, deregulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition."¹⁷ Nor has the Commission considered whether modification to its inside wiring rules could help meet the mandate of Section 706(a) of

¹⁵ *Report and Order and Further Notice of Proposed Rulemaking*, CC Docket No. 88-57 (Review of Sections 68.104 and 68.213 of the Commission's Rules Concerning Competition of Simple Inside Wiring to the Telephone Network and Petition for Modification of Section 68-213 of the Commission's Rules filed by the Electronic Industries Association), 5 FCC Rcd 4686 (1990) ("*Common Carrier Wiring Order*"); *Order on Reconsideration, Second Report and Order and Second Further Notice of Proposed Rulemaking*, CC Docket No. 88-57 (Review of Sections 68.104 and 68.213 of the Commission's Rules Concerning Connection of Simple Inside Wiring to the Telephone Network), FCC 97-209 (released June 17, 1997) ("*Common Carrier Wiring Reconsideration Order*").

¹⁶ 47 C.F.R. Part 68.

¹⁷ S. Conf. Rep. No. 104-230, at 1 (1996). See also *Iowa Utils. Bd. v. FCC*, 120 F.3d 753, 791 (8th Cir. 1997).

the 1996 Act that the Commission encourage the deployment of advanced telecommunications services to all Americans on a reasonable and timely basis through "regulatory measures that remove barriers to infrastructure investment."¹⁸ Accordingly, KMC urges the Commission to take the following steps to assure that its inside wiring rules and policies best accord with the goals of the 1996 Act.

The Commission should issue a notice of proposed rulemaking to examine regulatory options for assuring that incumbent LECs' and building owners' do not use their control of inside wiring to thwart the goals of the 1996 Act. In the NPRM, the Commission should propose rules that would assure that customers in multi-unit buildings could choose the service provider of their choice, and that new entrants could provide the requested service, without undue restrictions imposed by owners of inside wiring, whether the building owner or the incumbent LEC. The Commission should propose to:

- prohibit ILECs and building owners from unreasonably restricting access to inside wiring or conduit by any service provider chosen by a customer in the building;
- establish inside wiring as an unbundled network element under Section 251(c)(3);
- prohibit incumbent LECs from entering into arrangements with building owners that provide for exclusive access to inside wiring (whether owned by the incumbent or the building owner);
- prohibit incumbent LECs from exercising any rights of ownership with respect to wiring installed and owned by them in multi-unit installations: and¹⁹

¹⁸ Pub. L. 104-104, Title VII, Sec. 706(a), Feb. 8, 1996, 110 Stat. 153, reproduced in the notes under 47 U.S.C. Sec. 157.

¹⁹ The Commission has previously prohibited incumbent LECs from exercising any ownership rights over simple inside wiring. *Inside Wiring Detariffing Order*, CC Docket 79-105, 51 Fed. Reg. 8498 (1986), paras.52, 57, *recon. in part, Inside Wiring Reconsideration*

- prohibit building owners from unreasonably discriminating in providing access to inside wiring to service providers.

KMC believes that these measures would help achieve the goals of the 1996 Act.

Customers within multi-unit buildings would not be thwarted in their choice of service provider and new entrants would be able to provide service without undue restrictions from owners of inside wiring. Finding that exclusivity arrangements are unlawful, and imposing nondiscriminatory obligations on building owners, will not unduly restrict the ability of building owners to negotiate competitively-neutral arrangements for access to, and use of, intra-building wiring. Thus, they may arrange with any carrier for installation and use of intra-building wiring or may permit any carrier to use existing wiring owned by the building owner subject only to an obligation to deal equally with all carriers. These actions would assure that the building owner could permit another carrier access to wiring and/or conduit and that customers may choose the service provider of their choice.

Pending consideration of any further rulemaking, the Commission, based on the record gathered in this proceeding, should also issue a declaratory ruling that exclusive access arrangements between building owners and incumbent LECs are unlawful under Sections 201-202 of the Communications Act, and that new service providers may use existing inside wiring installed by the incumbent LEC subject only to payment of reasonable costs to the incumbent

Order, 1 FCC Rcd 1190, *further recon.* 3 FCC Rcd 1719 (1988), *remanded* NARUC v. FCC, 880 F.2d 1989. The term "simple inside wiring" refers to telephone wiring installations of up to four access lines. See 47 C.F.R. § 68.213.

LEC.²⁰ This action would go along way, pending further rulemaking, to facilitate provision of competitive services by new entrants.

VI CONCLUSION

For these reasons, KMC respectfully requests that the Commission initiate a rulemaking to update its inside wiring program in light of the goals of the 1996 Act. The Commission should additionally in the present proceeding pending further rulemaking declare that exclusive inside wiring access arrangements between building owners and incumbent LECs are unlawful.

Respectfully submitted,



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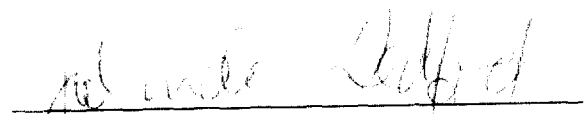
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²⁰ KMC believes that costs for use of intrabuilding wiring will be negligible because most wiring will have been fully depreciated by the incumbent LEC.

CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of October 1998, copies of the foregoing **Reply Comments of KMC Telecom Inc. in Docket No. 98-146** were served by U.S. mail and hand delivery as indicated below:

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